

GURDIT SINGH v. LIM YIN.

[Appellate Civil Juris. (Evans, J.) July 17, 1947]

Labour Code, section 85 and 228 — Claim for wages — Whether Controller of Labour has jurisdiction to deal with such claims.

The applicant in this case claimed before the Magistrate wages for the first three days of May plus one month's wages in lieu of notice from the defendant by whom he alleges he was employed as a watchman. At the hearing before the Magistrate the defendant produced a letter from the defendant to the plaintiff stating that the sum of \$29/- as "3 days' wages plus 2 weeks' wages as directed by the said Commissioner" had been deposited with the Commissioner of Labour. On this letter is an ink note purporting to be signed by some person as Deputy Commissioner of Labour. According to the Magistrate's Notes of Evidence this is a Certificate to the effect that the case had been dealt with in the Labour Office. The note adding that "plaintiff does not dispute this."

Held, (1) that the general provisions of the Labour Code do not confer any general jurisdiction on the Controller of Labour and therefore there was no jurisdiction for the Deputy Commissioner to deal with this case; (2) that there was no indication of how the alleged judgment was proved or the grounds on which it was accepted as such and that on the facts there was no evidence before the Magistrate on which he could have come to the conclusion he did.

CIVIL APPLICATION.

Evans, J. :— The applicant claimed before the Magistrate wages for the first three days of May plus one month's wages in lieu of notice from the defendant by whom he alleges he was employed as a Watchman at the rate of \$52.80 per month. The proceedings before the Magistrate seem to have been short; both the Notes of Evidence and the Grounds of Judgment are very brief. The defendant seems to have produced a copy of a letter from the defendant to the plaintiff stating that the sum of \$29/- as "3 days' wages plus 2 weeks' wages as directed by the said Commissioner" had been deposited with the Commissioner of Labour. On this letter is an ink note purporting to be signed by some person as Deputy Commissioner of Labour. According to the Notes of Evidence this is a certificate to the effect that the case has been dealt with in the Labour Office, the note adds that "plaintiff does not dispute this".

In fact the note reads :—"The Manager of Chun Koong & Co., has deposited \$29/- being 17 days' wages (3 days actual work done and 14 days' wages in lieu of notice). Gurdit Singh is a watchman and not a labourer under the Labour Code. He is entitled only for 14 days' wages in lieu of notice. Signed (?) Dy. Commissioner for Labour, Perak 2.6.47". It is therefore on the face of it a memorandum of deposit with a statement, apparently erroneous, of the law. The Grounds of Judgment do not set out the provisions

relied on and are in fact very defective as they give no indication of how the alleged judgment was proved or the grounds on which it was accepted as such.

This note is not such a document as could possibly be accepted in any Court of Law as proof, in itself, of a Judgment. It neither refers to any dispute nor does it make clear that both sides have been heard. The nature of the transaction referred to and the title used by the signatory of the note suggest that any jurisdiction claimed is under the Labour Code. This professes to be a Code, but, in fact, the general provisions therein are limited and largely consist of a number of chapters of more detailed provisions as to particular classes or cases. In one such class dealt with in Chapter 8 the Controller of Labour seems to have some general jurisdiction, but there is nothing to show that the appellant in this case falls within this or any other of the special classes. It is in fact probable from the appearance of the appellant, that the case does not fall within this Chapter. The general provisions of the Code do not confer any general jurisdiction on the Controller of Labour, but, on the other hand, Section 228 specifically preserves the right of civil action, while section 85 clearly contemplates as a general procedure the institution by the Controller of Labour of proceedings in the civil courts. There was no evidence before the Magistrate on which he could have come to the conclusion he did, and the case is therefore remitted for trial.

Order Accordingly.

KRISHNASAMY AND OTHERS v. D. C. BUTLER MADDEN.

[Orig. Civil Juris. (Evans, J.) August 23, 1947]

Specific Relief Enactment, Section 45 — Application for order to Assistant Food Controller to withdraw cancellation of retail licences — Judicial discretion — Food Control Proclamation — whether Assistant Food Controller has power to cancel licences — Delegation of Powers — Food Control Enactment 1939.

This was an application for an order under section 45 of the Specific Relief Enactment directed to the respondent who is the Assistant Food Controller of Lower Perak to withdraw the cancellation of the applicants' retail licences issued in February 1947. The applicants were seven traders carrying on business as general merchants or sundry goods shop keepers. They were granted by the Respondent on various dates in February 1947 licences in identical form to deal in food-stuffs retail, and to sell and store such foodstuffs at their respective premises. The licences purported to be given by the Food Controller and are signed by the respondent. They were limited to expire on 31st December 1947. At various dates on or between 12th and 18th of March 1947 they severally received a letter from the respondent again in identical terms informing each that

his licence was withdrawn. No notice of objection to their licences or of a proposal to withdraw was given.

Held, (1) that G. N. 80 of 1945 which purports to delegate certain powers to the Assistant Food Controller does not delegate to the Assistant Food Controller powers other than executive powers which can be exercised under the direction of a superior; (2) that although section 12 (2) of the Food Control Proclamation gives power to the Controller to revoke a licence "without any reason assigned", the Food Controller must in doing so exercise his discretion properly and fairly; (3) that the cancellation of the licences in this case was illegal and an order under section 45 of the Specific Relief Enactment should issue.

Cases referred to : —

- (1) *In re Tarabai* 7 Bom. 161.
- (2) *Rustom v. Kennedy* 26 Bom. 396.
- (3) *R. v. Newton and another* 24 L.J. Q.B. 246.
- (4) *R. v. Metropolitan Police Commissioner, Ex parte Holloway* (1911) 2 K.B. 1131.
- (5) *In re Naglingam Mudaliar* 31 Mad. L.J. 426.
- (6) *Gill v. Taja Noora* 27 Bom. 307.
- (7) *Wood v. Widnes Corporation* (1898) 1 Q.B. 467.
- (8) *Reg. v. Sylvester and others* 2 B. & S. 322.
- (9) *Rex v. London County Council* (1918) 1 K.B. 68.
- (10) *R. v. Metropolitan Police Commissioner, Ex parte Randall* (1911) 80 L.J. K.B. 223.
- (11) *R. v. Commissioner of Police, Ex parte Pearce* 27 T.L.R. 505.
- (12) *R. v. Weymouth Corporation, Ex parte Teletax (Weymouth) Ltd.* (1947) 63 T.L.R. 291.
- (13) *Barker v. Barker* 95 Law Times R. 549.
- (14) *Romilly v. Romilly* 151 Law Times R. 180.
- (15) *Evans v. Bartham* (1937) A.C. 479.
- (16) *Attorney General of Southern Nigeria v. John Holt & Co.* (1915) A.C. 599.

CIVIL APPLICATION.

S. M. Sharma for the applicants.

M. G. Neal (Crown Counsel) for the respondent.

Evans, J. : — This is an application for an Order under section 45 of the Specific Relief Enactment directed to the respondent who is the Assistant Food Controller of Lower Perak to withdraw the cancellation of the applicants' Retail Licences issued in February 1947.

The applicants for this Order are seven traders carrying on business as general merchants or sundry goods shop-keepers in Bagan Datoh, Hutan Melintang and villages in that neighbourhood. They were

granted by the Respondent on various dates in February last licences in identical form to deal in foodstuffs retail, and to sell and store such foodstuffs at their respective premises. The licences purport to be given by the Food Controller and are signed by the respondent. They are limited to expire on 31st December, 1947.

At various dates on or between 12th and 18th of March they severally received a letter from the respondent again in identical terms informing each that his licence was withdrawn. No notice of objection to their licences or of a proposal to withdraw was given. The letter gives as a reason for withdrawal that there are in that area redundant licences some given to persons with 10 to 100 registered consumers, that small profit can be derived from such trading, and that difficulty was experienced by the Food Control Office in their control.

According to figures sworn to by Krishnasamy and not specifically denied, the persons to whom this letter was addressed were all traders with more than thrice the proposed minimum number of registered consumers on their books, and so did not fall under this ban apart, of course, from any question of the respondent's right or power to legislate against small traders. They protested against the proposed withdrawal. Various interviews took place which are not very material. On 23rd April a general meeting of about 30 retailers, said by respondent to be all whose licences had been cancelled, was called at the Food Control Office, at which the respondent announced that he had withdrawn the cancellation of nine retailers. Two of these have less customers than any of the applicants. The respondent in his affidavits later seems to refer to this meeting when he speaks of giving a "lecture" on that day, and, in that in answer to Krishnasamy, when he swears that on the same day he told the meeting of retailers that he had good reason to believe that they held a number of bogus cards, and that if these were surrendered he would reconsider the cancellation of their licences.

This offer is testified to by respondent himself. It indicates, if true, a reversal of his previous grounds which were, apparently, not to be acted on at all, if the new ground of objection were removed. Rather curiously this accusation and offer are not mentioned by Krishnasamy, who alone of the applicants refers to this meeting, but who does refer to and produce a letter of the respondent to the Assistant Food Controller, Ipoh. This letter is not denied, it is dated the same day as the meeting and it makes no mention whatever of this over-riding consideration. This letter was sent

by respondent to Krishnasamy under cover of one dated 2nd May which is also silent on this point. This deponent alleges that similar letters were received by Muthusamy and Inthra Stores, but neither of these applicants refers to it. As they do not refer to any events in these days, the omission is not significant. On the other hand respondent's silence at the time certainly is, as this allegation of Bogus Cards has become of first importance and was put forward when shewing cause as one of the respondent's principal points. A large number of allegations have been made against one side and the other and against one Nadarajah who is one of the principal deponents for the applicants, and a former Rationing Officer under the respondent. Most of them go to *bona fides*, which, in my view of the matter, is not relevant, but this allegation really goes to what is the *fons et origo* of the whole trouble. Before however passing to that matter I must notice another allegation closely connected therewith in the respondent's affidavit last referred to when he goes on in paragraph 19:— "Up to the time of his dismissal referred to, one Nadarajah as Rationing Officer was in sole charge of the issue of ration cards and all cards were issued by him". This unqualified statement standing where it does and implying that Nadarajah is responsible for the wholesale issue of "bogus" cards is in my opinion on the evidence before me wholly untrue, and should be untrue to the knowledge of the deponent. The facts more than once alleged and not denied are that Nadarajah joined the Food Control Office as Rationing Officer on 1st January, 1946. The allegation of respondent made as Assistant Food Controller and not questioned, is that there are in his area three times as many food cards issued as there is population. Nadarajah who seems to be the respondent's chief channel of information regarding events prior to his arrival, states that there are 50,000 forms and 10,000 "in lieu" forms issued in respect of 276,000 persons all issued by the British Military Administration before he had a hand in the issue. It may be noted that all Original cards produced in this case are, without exception, dated November, 1945. The date of issue is stamped by the Food Control Office, British Military Administration. I have no hesitation in accepting Nadarajah's word on this point.

The cards exhibited, the evidence given and the nature of system as described all show that these cards were issued by the Food Control Department and it is difficult to see how they could have been issued in these numbers without the grossest negligence. That seems to have been the negligence of the Department

and there is nothing in any of the respondent's allegations which goes to show that the retailers are in any way responsible for that negligence, or its consequences, or that they were party to any deceit practised on the Department's officer. Their collusion is quite unnecessary and deceit is not usually widely published.

The Food Control Department seem to have flooded the area with what are in effect documents of title to rations, and the responsibility is theirs. It is no part of the retailer's business or statutory duties to carry out checks for the department or to correct their errors, or to take any active steps to protect them from fraud. Each Ration Card contains a list of persons said by the Department to be persons entitled to rations. It also states the retail dealer to supply and on that document I do not see how that dealer could properly, or, in truth, legally, refuse to supply from his stock. There is no reason to suppose the purchaser will tell that he has a second card elsewhere. If a man moves his card should come through for transfer. If a purchaser does not appear to draw his ration for several weeks the dealer has no guarantee he will not come later and claim. Nor has any provision been cited to me whereby after a stated period he might presume the man would not come, or should inform the Controller.

Subsequent to these events, in the case of Krishnasamy on 24th May, and in the case of the other applicants on dates in June, the respondent instituted checks of cards registered with them. Some of these checks are not completed. They seem to be based on an assumption that the bogus holders are non-existent. The cards which each applicant is to supply are collected, and the holders are required to claim them. Any unclaimed are, it seems, assumed to be for non-existent persons, and the retailer is assumed to be aware of this. In showing cause it was stated on behalf of the respondent that cards are issued through retailers who make out a list of customers and who it was said guarantee the existence of the person. Nadarajah denies that cards are so issued and I see no reason to disbelieve him. No other facts are asserted in justification of the two assumptions referred to. Nadarajah joined the Department on 1.1.1946 and the respondent went to Telok Anson on 8.4.1946. There is no direct evidence of how the original issue was made. One would assume that personal appearance before the issuing officer would be required on the issue of such documents. But if the Department substituted retailers for its officers and obtained lists through them, it would be still easier for the cheat to

inscribe his name with two retailers than to appear twice in person or through a member of the household before a Government Officer. Such a system would seem inadequate. Persons applying for cards may have been identified by Ketuas and there would then be better ground to assume collusion by them. The retailer might be at least as easily deceived as the Department. No authority in fact or law has been adduced for the existence of any guarantee, nor have its terms been defined. The retailer may guarantee that a man giving this name claimed rations through him, but I cannot imagine that any sane man in such circumstances ever guaranteed that no applicant had committed any fraud. On the other hand one duplicate card holder may be bold enough to claim his card, while others may think it is not worth the risk. Claimants and genuine claimants are not the same thing, and no test has been described to distinguish them. One claiming from the respondent jumped from the window and ran away. Applicants have submitted lists of customers which do not tally with the check of claimants, but some holders may be prepared to thumb mark—usually with an unidentifiable mark—a list when they would not dare to claim. The check as described is incapable of proving the respondent's conclusions and, itself, fixing the retailer in question with fraud. Moreover assuming the respondent's figures, no check made comes anywhere near discovering the 66 per cent. bogus cards which should be expected, and would thus tend to show that these retailers hold less bogus cards than others. Lastly it may be noted that all the applicants purchased their businesses in the course of 1946 except one who bought in January, 1947. None, therefore, had anything to do with the original issue of Ration Cards.

These considerations largely relate to the third point taken by the respondent in showing cause and the later facts appear from his affidavits in reply. They are, however, more conveniently taken here in connection with the other facts. Most of the facts are proved by affidavits and appear in the record, but three deponents were cross-examined before me. Apart from the facts already referred to, I do not think any material fact and none conclusive was proved thereby. Nevertheless other views might be taken and I conceive it is my duty to make some finding as to their credibility though none impressed me very favourably. Nadarajah is a plausible Indian, but I think has some knowledge of the work and is in general to be believed as to the procedure and entries. On the other hand I think he was very probably lacking in loyalty and frankness to his superior and may well have arrogated powers and

responsibilities and assumed an importance which had not previously been, and should not have been, his. He was in charge of the office when it was taken over by the respondent, who does not seem to have had the advantage of taking over from his predecessor, or of any official testament or handing over notes; none has been referred to. It is not clear when he took charge or who was in charge in January 1946 when certain derelictions of duty are said to have taken place, to which I shall have to refer later, when dealing with the respondent's principal points in showing cause.

Kanapathy's evidence goes to prove lack of *bona fides* and oppressive conduct by the respondent, and is in my opinion irrelevant. So far as one can see through the dark glass of Tamil interpretation he is of low intellect for a Tamil labourer, but with this large qualification I think he was telling what he thought was true. What he said tended to support the applicants' contentions, but he was so incapable of understanding the proceedings he related that he could prove nothing definitely.

The respondent is a young man who is carried away by his feelings. While he seemed very ready to blame others on very little ground, he takes a very light view of his own responsibilities and seems to have no idea whatever of the importance of the licences in question. There are some 411 retail licences granted in his area. The issue of these does not seem a large task. To compare their issue to that, for instance, of a liquor licence in England may be exaggeration, nevertheless the procedure in issuing these on which this case rests seems slack and perfunctory. I have referred to some of his statements which seem to me untrue and wild. He was prevaricating and I feel the same might be said of his dealings with the applicants in April and May. He seemed to me headstrong. I do not regard the allegations made against him as impossible though nothing more was done to substantiate them, and in my view they are irrelevant.

The applicants seem to have gone to two lawyers before going to their present adviser, and, having obtained no satisfaction from the letters written, or other steps taken, they moved this Court on 11.6.47 for an order under sections 45 of Cap 5. The applicants relied on the facts alleged by them above as they then appeared in the affidavits of the first applicant and of Nadarajah. Section 50 of the Enactment seemed clearly to imply that the order asked for corresponded to a mandamus. On the other hand the allegations of want of good faith seemed designed to support an application for certiorari.

Their counsel argued that the Assistant Food Controller of a district had no power to cancel a licence under the Food Control Proclamation (No. 10). Secondly that the licences could not in any case be cancelled without reason, and if he had a discretion it must be exercised judicially. Thirdly that the reason given was bad and in fact inapplicable to the applicants who all had more than the minimum custom, that the respondent's letter of 2nd May (which from the silence of the later affidavits seems only to have been sent for certain to Krishnasamy) was a definite refusal to recognise his own licence, and a wrongful act which by the argument in *In re Tarabai*⁽¹⁾ he might be required to undo, and fourthly on the ground of *mala fides*, relying primarily on Nadarajah's allegation of tampering, at respondent's direction, with the licences surrendered on the grant of those now in dispute. The second and last grounds sounded more consonant with an application for certiorari as there seemed to be no allegation of refusing jurisdiction. The first and third suggested that the act complained of was a nullity, that applicants might stand on their rights and that mandamus was not the necessary and proper remedy. The case cited however was apposite and went to show that an order under the section might lie. The applicants also cited *Rustom v. Kennedy*⁽²⁾ to show that a licence was a right for which an order might lie.

The Crown Counsel in reply cited G.N. 80 of 1945 as the authority for the Assistant Food Controller's exercising the powers of the Controller under the Proclamation to cancel a licence. That notice reads:—

In exercise of the powers conferred upon him by section 11 of the Food Control Proclamation, 1945, and of all other powers enabling him, the Food Controller hereby delegates to each and every Assistant Food Controller appointed under the Food Control Proclamation the powers conferred upon him by section 4 (i), (ii) and (iv), sections 6, 7, 8, 9, 10 and 12 of the said Proclamation, subject to such orders and directions as they may from time to time receive from the Food Controller.

The concluding words seemed to me, and still seem to me, quite inconsistent with the delegation of any discretion, and failed to support counsel's argument. With the Notification before one it might be convenient to make some other observations on this legislation before passing on.

This is certainly wholesale delegation in the most general terms, so general as to be vague. The relevant section of the Proclamation for our purpose is Section 12 which is here enumerated. That section contains a variety of powers, and, it is now alleged, a discretion at least as to cancellation of a licence. The power to delegate is contained in Section 11 of the Proclamation

and enables the Controller to delegate any of his powers. It might be said that 'powers' includes 'discretionary powers'. A discretion, however, is a very personal matter and there seems to me no presumption that the legislature would contemplate its delegation or that such delegation where not expressly made should be readily inferred. It has always been held that any legislation conferring any form of jurisdiction must be clear and definite. The rights conferred by a licence may be proprietary rights and it has always been held that such rights cannot be taken away without express authority. These considerations confirm in my opinion that this notice is not apt to delegate powers other than executive powers, which can be exercised under the direction of a superior. The Food Controller has made an affidavit that no "orders and directions" have been given but I do not think subsequent use can give any guidance to the true construction.

For the rest Crown Counsel cited *R. v. Newton and another*⁽³⁾ as authority for the proposition that mandamus would not lie on the exercise of a discretion. The point hardly needed elaborating. As Wightman J. said in that case that was a judicial matter. The remedy sought here and some of the arguments made, treated this as a ministerial act. Thus the arguments were at large and the parties never came to grips. On the authority of *In re Tarabai* (above) I made the *rule nisi*, requiring, at the respondent's request, applicants to file affidavits on behalf of each individual and leaving them to add a motion for certiorari founded on abuse of a discretion if they thought fit.

On the hearing to show cause Mr. Sharma in his reply argued that section 45 was part of a code and must be read independently of the English Law. This argument is new and he quoted no authority. The text book which he was using *Sarkar's Specific Relief Act* flatly contradicts this argument. It states at page 304 that the principles applicable to mandamus apply to orders under section 45. The cases cited support this and, in fact, in most Indian cases the English authorities are freely cited. The implication from section 50 that the order is in lieu of this prerogative writ which is thereby abolished, seemed to me sound and I have dealt with the matter on that basis.

On 16.7.47 the respondent showed cause on three grounds; all are of some novelty. The first ground was that the application did not conform with provisos or conditions (b) and (h) of section 45. It was said to offend against the former because it was not shown that there is any statutory authority requiring the respondent to withdraw a cancellation. This seems a mere matter of words and one which, if the peculiar

arguments of *In re Tarabai* may be followed, is not of much moment. It ignores the real question of whether there be any ministerial act or acts which the respondent owes to the applicants, and simply considers the language which may be necessary to require their performance if they exist. The application is said to offend against (h) because the Rules published in Gazette Notification No. 82 of 1945 would exclude the issue to or recognition of any licence in their hands. These Rules also form the basis of his second ground.

The second ground is that by virtue of these Rules the applicants never had any licences and that the licences, the cancellation of which they attack, were never valid. There was no power in the Assistant Food Controller, or, he suggested, in the Controller, to issue a fresh licence at that date, while these licences could not operate as renewals because there were no prior valid licences to renew at the dates of issue.

These Rules were not referred to in the *rule nisi* and they are now invoked, not on the former plea of the plenitude of the Assistant Food Controller's powers and authorities, but to show the narrow limitation of his powers. They are it will be observed made by the same authority, on the same day and published on the same page of the gazette, as the order G.N. 80 which was said to give the Assistant Food Controller full delegated powers. They may be divided from the order, even as the Rules themselves are divided into rules, but it is difficult not to read them as part of the same legislation.

It is impossible to accept the respondent's contention that these Rules limit the powers of the Food Controller or his Deputy. Their powers depend on the Proclamation and not on any delegation under it. It is true that where an officer or body is given executive powers and also power to make rules, he may make rules as to how he will exercise those powers, and is then bound by his rules. In the words of Farwell L.J. in *R. v. Metropolitan Police Commissioner, Ex parte Holloway*⁽⁴⁾ "The Secretary of State having published the Order stating the conditions on which licences shall be granted, has, in my opinion, no discretion left by which he can refuse on any other ground to grant such a licence". This seems to me quite different from such person or body professing, and that not expressly but by implication only, to forgo after a certain date the powers which the legislature has said he is to exercise. The Controller in this case might amend his subsidiary legislation, but in so doing would, I conceive, be performing a public function to which he could not be compelled by an individual.

Apart from this legislative power he has still the power to issue which the Proclamation confers.

These Rules are called the Wholesale and Retail Dealers (Licensing) Rules. Rule 2 reads :— "Wholesale or retail dealing in any controlled article is hereby limited to holders of licences therefor, which must be obtained within one month of the date of this order".

The remaining rules deal with the mode of making application for licences to be granted in accordance with Rules 2 and for renewals of such licences. It will be observed that while these confer powers or impose duties on the Assistant Food Controller Rule 2 is in form a general prohibition of trading and applies rather to the public than to officers. The drafting is slovenly by "Order" is presumably meant "Rules". Nor can the Rule mean all it says or only those with unusual foresight could hold a licence for articles which became controlled articles at a later date. There is no definition of controlled article and the natural construction of the words "any controlled article" would lead to absurdity. These words can only be understood as referring to Gazette Notification No. 81 of the same date and read as meaning any articles referred to therein.

This is a further reason for reading these different instruments as one. A backhand mode expression is not uncommon in modern legislation and such a form of words as is used in Rule 2 is not uncommonly employed to mean that all persons of a class should obtain licences to do certain acts. The wording seems to have been determined here by a desire to conform to the language of section 4 (1) (iv) of the Proclamation. This may be relevant later when considering the Controller's powers under the Proclamation but is not strictly relevant to the respondent's grounds.

Gazette Notification No. 80, the Order made under section 11 of the Proclamation, is as has been stated extremely wide, and the powers delegated are subject to such orders and directions as may be received from the Food Controller. Reference is there made to orders and directions. The former word would be appropriate to specific written orders, but may refer to Orders made under section 4 of the Proclamation. The word is, however, spelt with a small 'o'. Directions seems to refer to departmental instructions. Neither word is appropriate to describe these Rules. Reading the rules as a whole and having regard to the general wording of Rule 2, I do not think they can be construed as *ad hoc* directions. If the powers conferred by Gazette Notification No. 80 were general there would be nothing to confine the Assistant Food Controller within Gazette Notification No. 82.

The latter can only be construed as limiting Gazette Notification No. 80 and the only powers under section 12 delegated to the Assistant Food Controller are therefore, in my opinion, those set out in the Rules. This is the law for the time being in force which the Respondent argues expressly excludes under proviso (h) of section 45, the order asked. To ask for a licence now is to ask for something contrary to Rule 2. This point again depends on the exact language of the order asked, and that on the nature of the rights which the applicants are seeking to vindicate.

The respondent's second ground is based on the same Rules and Orders which I have just considered. The Assistant Food Controller's powers are, he argues, restricted by Rule 2. There is in fact no doubt that rice was at the time of the promulgation of those Rules a controlled article. It is named in Gazette Notification No. 81. The Assistant Food Controller's power to issue licences in respect of such articles is to be found in Rule 4 and may be exercised in respect of applications made under Rule 3 which in their turn are for licences under Rule 2. Provision is made for application for renewals but there is no express provision as to their issue. Moreover, he says, the wording of Rule 2 would render any other licence of no effect in admitting the licensee to the privileged circle of dealers. The effect of the time limit in Rule 2 is that all effective licences must be applied for between 1st and 20th January 1946 inclusive. No such licence had been applied for by any of the applicants nor by their predecessors in title. This takes us back in to the history of these shops.

In January, 1946, each of these shops was being carried on by another dealer, the vendor of the respective applicants. Each was carried on under a licence issued by the Japanese Occupying Forces. Those licences have been produced by the respondent and are not disputed. They are headed "The Nippon Government" and profess to be made under 'The Food (Registration of Dealers) Order' which is apparently the order of 1939 which was in fact reprinted by the Nipponese. They are made out in pencil but appear to have been issued in January, 1945, or 1946, and are limited to expire on 31st December of that year. A number of alterations have been made.

The word Nippon has been struck out and British inserted. The word Temporary has been written nearby but to what it refers is obscure. The alterations do not appear to have been made at the same time and are not dated. Nadarajah has sworn that he inserted the word temporary in each after its surrender and at the

respondent's direction. This assertion was not cross-examined to nor is it denied by the respondent in affidavit or orally. An alteration so made cannot of course affect the applicants in any way.

The licensee's name has been changed to that of an applicant. In the cases of the first five that alteration is duly initialled and dated, it is said by Nadarajah. Each licence, except Muthusamy's, was on the same day countersigned and stamped by Nadarajah. In Muthusamy's the initial is dated 28.1.46. In the case of Sockalingam the licence is countersigned and stamped by Nadarajah without date. This gloss is struck out and it is signed, stamped, and dated 30.1.47 by the respondent. The alteration of the licensee's name has apparently been prepared for initialling but is not initialled. The Nipponese licence of the last applicant is countersigned and stamped by the respondent and dated 31.10.46, the licensee's name is altered but not initialled. Each except Muthusamy's bears letters and figures in manuscript which are said to refer to the application for transfer, and it is not disputed that respondent authorised all such transfers. It is hardly necessary to add that the Rules made no provision at all for transfer. Nor does it appear that when this difficulty occurred any reference was made to the Controller.

The Food (Registration of Dealers) Order is apparently the Rice (Registration of Dealers) Order 1939 which was reprinted by the Nipponese and extended to other goods, and these licences, but for the heading and the foods to be sold, are identical with the licence form scheduled to the pre-occupation Rules.

The businesses, other than Muthusamy's in respect of which these Nipponese licences were issued were all sold and the licences transferred during the term of the respondent's office. In each case application was made for such transfer and in each case that transfer was officially approved. In four cases the licence seems to have been amended by Nadarajah with respondent's sanction and in the other two by the respondent himself. In neither case is there any note of any term or condition of the transfer. In Muthusamy's case the business was sold in February 1946, the date of the initial seems to have been tampered with. It is signed by Nadarajah for no specified purpose.

It is now asserted that these transfers were temporary. In view of the uncontradicted evidence of Nadarajah as to the marking of the licences, and of the absence of copies of any letters to purchasers, I am satisfied that notice of no such condition was given them. The only note which might be supposed to have

come to the notice of any one, is in the case of Sockalingam where there is a note of refusal on the indenture of sale. This deed is, however, produced by respondent though no explanation is given of why it is in his possession, and it is not said it was ever in Sockalingam's possession with this note.

On these facts the respondent advances several reasons for his cynical plea that his actions are all completely illegal. None of the applicants nor his predecessor ever had a licence in accordance with Rule 2. The transfers on five were not made by the Assistant Food Controller, apparently as not being signed by him, and are ineffective, though approved by him. The applicants' licences according to their own tenor all expired on 31st December, 1945. The applications of the purchasers, the approval of licences and the later licences for this year are all waste paper, though received or issued in the ordinary course of the office business and purporting to be valid. Certainly these proceedings are nowhere in accordance with the Rules but I do not think this matter can be finally concluded on these narrow grounds.

The third ground put forward by Respondent showing cause was that respondent's affidavits showed that the applicants had drawn rations for untraced persons. All the affidavits show in fact is that other persons have made what are called checks and that all alleged consumers have not appeared at the Food Control Office. Nothing is proved of rations issued nor do any steps seem to have been taken to get the applicants to identify persons on their lists as supplied by them with rice. The possibility of a double registration seems to be ignored, and no check is made for that although it is very obvious and proved by many experiences that when anything is rationed large numbers will at once try to get more than their share. The matter has already been referred to at length, and when these considerations were pointed out to the Crown Counsel he did not press the point.

Mr. Sharma in reply dealt mainly with the question of *bona fide* exercise of a discretion, and with the evidence in this case, of which there is some, and much undenied, of the respondents lack of *bona fides* in the exercise of his powers if they be discretionary. It was in this connection that he maintained that an order under section 45 of Cap. 5 is not tantamount to a mandamus, a point with which I have dealt. He referred to a number of cases among them *In re Nagalinga Mudaliar*⁽⁵⁾ and *Gill v. Taja Noora*⁽⁶⁾. There is no report of the former available but it is three times referred to at some length in Mr. Sarkar's work. Both cases deal with the exercise of discretionary

powers. The former would seem to establish the proposition that where this plea of official convenience or expediency, in effect the last and fundamental reason put forward in the respondent's letter of 18th March, is pushed to the extent of depriving persons of their lawful right such discretion would not then be considered to be *bona fide* exercised. The second is an example of the series of cases in England decided on the ground that a person charged with such a power cannot legislate and prejudge cases by general rules, but must decide each case on its merits. In fact the case was decided on the authority of *Wood v. Widnes Corporation*⁽⁷⁾. That case was not one on a rule nisi for a writ. Nor was *Reg. v. Sylvester and others*⁽⁸⁾ an older case, since followed, which was an appeal from the licensing justices, but *Rex v. London County Council*⁽⁹⁾ in which *Sylvester's* case was applied was for a mandamus. In *Gill v. Taja Noora* (supra) the order made was to grant a hackney carriage licence, though it seems to have been generally accepted that the Commissioner of Police to whom it was directed had a discretionary power. It would have seemed that the only mandamus which would lie was to hear this application on its merits as in *Rex v. London County Council* in which an order to hear was made where the London County Council had summarily refused the permission asked. No point was made in the Indian case of the form of the order. I do not think this supports Mr. Sharma's plea that the English law is not applicable, and had I to choose I would prefer to follow *Rex v. London County Council*.

Before proceeding to the general considerations I have indicated, there are two matters of fact in the later development of the case which require notice. After the letter of 2nd May sent to Krishnasamy the respondent on 7th May sent to each of the applicants a letter in which he informs them that the 1947 licences were sent to them, it says nothing of the granting, "through a clerical error". The respondent showing cause filed 8 affidavits, in addition to those speaking of the checks, alleging overcharging in March and April. Crown Counsel made no use of these though they can hardly have been filed without his knowledge. Mr. Sharma cross-examined one deponent (Kanapathy) to show how these affidavits were obtained. Overcharging is a criminal offence and this is the first allegation of it. In the respondent's departmental letter of 23rd April mention is made to another official of charging for transport, but this is not the same thing. Moreover, the overcharging alleged is mainly subsequent to the cancellation and could not have had any bearing on that act. These facts

are said to show *mala fides* and may well do so. Such elaboration exaggeration and variation of a case is not to be commended.

The letter of the 7th May is a further example of the same kind. The respondent was cross-examined about this, and the term clerical error seems to me a misnomer. The respondent's attitude or that he is made to assume, to the matter is that these are, documents of such little moment that he cannot be expected to check them, or that he is in his clerk's hands and signs what is put before him. I cannot accept that attitude. The matter is of importance. The number to be issued is some 411 and does not seem a herculean task. The documents are the documents of title to the applicant's livelihood; they affect the food of the people and are of the first importance. On the one hand the respondent is careless of any distinction between the reasons or grounds on which he acted and excuses made afterwards for something done; and on the other seems quite casual about the grant of a licence. They are, to be lightly granted, and cancelled. The existence of any law on the matter, and its relevance to his acts seem almost ignored. One might suppose that respondent thinks the law is there, his actions may fall inside or out. If they fall within, they are valid, if they fall without they are nullities for which he is under no responsibility. If his acts or omissions cause loss, or if his representations lead people to act to their detriment, he is alike irresponsible.

All these applicants have bought licensed businesses. Krishnasamy specifically deposes that he paid the price "On this assurance being given", by the respondent: that the licence would be transferred. This has never been denied. No man is likely to purchase on anything less. I do not believe that when the note of transfer was made on the Japanese licence the word "temporary" was on them. Periasamy denies any verbal intimation to this effect. No written notices to that effect have been produced. Had the word been used, I feel sure some question must have been raised and a meaning would have been attached to it. To me it is meaningless when attached to licences issued for a short term, and, according to respondent's argument on the rule nisi, liable to cancellation by him at any moment. The fact and circumstances of Muthusamy's transfer are obscure, but in the case of Krishnasamy, and I think of the others, the purchase must have been on the respondent's approval of the transfer of the licence. He was subsequently treated as a duly licensed retailer having consumers registered with him. Such treatment seems

to be a representation by general conduct and use that he is such a retailer.

The Crown Counsel's argument on Rule 2 is that only licences taken in the period of 1st — 20th January, 1946 and renewals of such licences are valid. Areas may develop or decay and businesses may cease, but this rule remains, and while it remains new licences could not be issued. In other districts it is said new licences were issued during this period, but in Teluk Anson, except, I suppose, for such as might be casually asked for no licences were issued. During that period someone at the Teluk Anson Food Office completely neglected his duty. The result of this argument would be that all sale or retail sale at least, of rice and other controlled foods, the supply and distribution of the people's food, is unlawful. Incidentally it means that respondent has been consistently assisting in these unlawful acts. That, it seems to me, would be bureaucracy run mad. I do not think the law can be so at the mercy of departmental rules.

The case involves wider considerations than these. It is necessary to consider the nature of the applicants' rights, and that of the licence. To do this it will be necessary to consider the legislation under which this is granted and the legislation the present replaces. Licences were said to be granted for collection of revenue or for the control of a possible evil. They are now required in so many connections that no classification seems ever attempted. Here there is apparently no fee payable, nor can the retailing of food be considered evil. Food is the first need and consideration of every animal. To be free to earn his livelihood by a lawful trade has always been regarded as a freeman's primary right. The selling of beer is a lawful trade which in England has long been subject to licence. While the separation of the discretion in the justices from the issue by the Excise, the provisions for compensation on the withdrawal of redundant licences, and the bulk and detail of the legislation as to liquor licences makes it a slight guide in other cases, these indicate what experience has shown to be desirable in licensing a trade dealing in daily needs. The applicants are traders, and the 3rd applicant, in a letter exhibited by the respondent, claims, in his case at least, to be of long standing. Their claim is to exercise their trade and to carry on their business. In carrying on their business they may acquire a reputation and goodwill. Their right is, in my opinion, a proprietary right and one which cannot be taken away without express provision of what would be expropriating legislation. It is said, and with good

reason, that the rice trade is essential or highly advantageous to other trade. People must buy rice and will buy other goods where they get their rice. Officials cannot restrict or prohibit the exercise of such a right except in so far as they may be empowered by legislation.

The legislation relied on in this case is Proclamation X. This may have been made in difficult times, but nearly two years have passed since then. It is the established law and the public are assured that shortage and restriction may be expected for another 7 years. I, therefore, see no reason for not applying the usual rules of construction to it. It contains two relevant provisions. The first is in section 4 (1) (v) which confers powers on the Food Controller and Deputy Food Controller "To limit the wholesale or retail dealing in any controlled article to such persons as shall hold licences or permits therefor under this Proclamation or any rules or orders thereunder". Sub-section (2) deals with the mode of exercising this power, among others, by making orders, rules etc. and of their promulgation. As has been pointed out, the form of this sub-section seems to have determined the form of Rule 2 of the Wholesale and Retail Dealers (Licensing) Rules (G.N. 82/45). It says nothing about limiting the numbers of traders, nor of selecting among them. It gives no authority for putting a man out of business, with or without a fair trial.

In addition to expropriating a factor of value in the applicants' businesses, and to restricting trade by preventing them from exercising their lawful callings, a wider interpretation of section 4 (1) would give a power which might be used and in places would probably be used to create monopolies. Such powers can only be created by words which are clear and unambiguous.

The second provision is in section 12 which gives the power to issue licences and to revoke them. Sub-section (1) :—

"Without prejudice to any other powers conferred upon the Controller by this Proclamation, the Controller may issue licences or permits for wholesale or retail dealing in any controlled article subject to such conditions as he may think fit".

The issue of licences is frequently the subject of legislation. In each case reference must be made to the terms of the particular legislation, and the powers, conditions and other circumstances of granting vary according to the provisions actually made. Nevertheless that the same principles should, as far as possible, be

applied to all seems certainly to have been the opinion of Darling J., for in *Rex v. London County Council*⁽⁹⁾, an application for a mandamus by a lady who had been summarily refused permission to sell charity literature in a public park, he begins his judgment :—

This rule must be made absolute. The Court can come to no other decision without infringing the principles governing the hearing of applications for licences to sell intoxicating liquors. It has been laid down that the body on whom is conferred the jurisdiction of granting such licences must hear each application on its merits and cannot come to a general resolution to refuse a licence to everybody who does not conform to some particular requirement.

The closest analogy to the legislation and circumstances of this case seems to be found in the issue of hackney carriage licences in London. There too the legislation empowers the Secretary of State to issue and that power is exercised, on delegation by Order, by the Commissioner of the Metropolitan Police. That Order was as follows :—

A licence for a cab or stage carriage may be granted to any person by the Commissioner of Police of the Metropolis.....subject to the following exceptions:—

- (a) A licence shall not be granted to any person under the age of 21 years, and any licence so granted shall be void.
- (b) The Commissioner may at his discretion refuse a licence to any person who has been convicted of a felony, misdemeanour, or of cruelty to animals; or who, having previously held a licence for a cab or stage carriage, had had such previous licence revoked or suspended.

The effect of this has been considered on several occasions. In *R. v. Metropolitan Police Commissioner, Ex parte Randall*⁽¹⁰⁾ the Divisional Court held that it conferred a discretion on the Commissioner which had been *bona fide* exercised and refused a mandamus. This decision was followed later in the same year in a Divisional Court of three different Judges in *R. v. Commissioner of Police, Ex parte Pearce*⁽¹¹⁾ in which case however the Court did not accept the reasons given in the affidavit of the Commissioner but thought he had acted on a preconceived rule. It made a rule for a mandamus absolute. This rule is not set out verbatim but the case reads as if it were a mandamus to grant the licence and not to hear the application and exercise the discretion. These cases however are *overruled* by the decision of the Court of Appeal in *R. v. Metropolitan Police Commissioner, Ex parte Holloway*⁽⁴⁾ later in the same year. That case decided that the Commissioner of Police's discretion was limited to the two exceptions. The use of the word "may be granted" gave no general discretion. The act, [The Metropolitan Public Carriage Act 1869, Sections 6 and 11] under which the Secretary of State made his Order provided that "one of His Majesty's principal

Secretaries of State may from time to time licence to ply for hire” and that “any licence grantable by the Secretary of State under this Act may, if the said Secretary of State so direct be granted by the Commissioner of Metropolitan Police” In his judgment Farwell L.J. said :—

Section 6 of the Act of 1869 imposes two duties on the Secretary of State. The first duty is to grant licences, and the Act makes it penal to use an unlicensed hackney carriage; to say that the Secretary of State may take all hackney carriages off the streets by refusing to license any seems to me extravagant. He has, therefore, a duty to license. He has a second duty, namely, to promulgate an Order stating the conditions subject to which the licences are granted. Having made the Order he is as much bound by it as any delegate of his in the shape of a Commissioner of Police. The Secretary of State having published the Order stating the conditions on which licences shall be granted has, in my opinion, no discretion left by which he can refuse on any other ground to grant such a licence.

At page 1140 he went with remarks which might apply to the respondent's ideas on the suppression of the poorest traders :—

When the statute has forbidden anybody but a licensed proprietor of a hackney coach to put on, or to use or ply for hire with a carriage on, the streets, it necessarily implies that all parties shall be treated fairly and alike unless and until the Secretary of State, to whom is committed the duty, shall make provisions applicable to all alike, saying that such and such classes of persons shall be refused. To say that either the Secretary of State or the Commissioner may refuse to license, not a class of persons, but an individual, because, as in the present case, he thinks he has not got money enough, seems to me to be an interference with the rights and liberties of the public as a body which I cannot find justified by anything in the Act.

Again Cozens-Hardy L.J. at page 1136 said :—

Now licences have been granted to cab proprietors certainly since the early part of last century. I think the first Act called to our attention was the Act of 1831. It is common knowledge that the number of cabs in the metropolitan district is enormous. I am told it is about 17,000. To suppose that the Legislature intended to leave it absolutely in the discretion of the Home Secretary summarily to put an end to the occupation of all these cab proprietors and cabdrivers is, to say the least, rather startling.

If this proposition is startling one wonders what word should be applied to the suggestion that not the Home Secretary of Great Britain, but the Assistant Food Controller, Teluk Anson, should be vested with such powers, not in respect of persons carrying on a trade ministering to the ease or convenience of those who can afford to pay for a taxi, but to persons whose trade is supplying the first necessities of life.

In my opinion the wording of the Metropolitan Public Carriage Act 1869 section 6 does not differ materially from that of our Proclamation. It may, however, be compared with an older statute which has been the subject of more recent interpretation. That

is the Town Police Clauses Act, 1847 which is in force in many towns outside London and which also makes provision for granting hackney carriage licences, but in the following terms :—

The commissioners may from time to time license to ply for hire within the prescribed distance, or if no distance is prescribed within five miles from the general post office of the city, town, or place to which the special Act refers, ... such number of hackney coaches or carriages of any kind or description adapted to the carriage of persons as they think fit.

The Lord Chief Justice in *Rex v. Weymouth Corporation, Ex parte Teletax (Weymouth) Ltd.*⁽¹²⁾, commented on it thus :—

That seems to be a reasonably clear section, and, if we give to it its ordinary meaning as English, it is clear that the commissioners are to license a vehicle as a hackney carriage. It seems reasonably clear from the section that Parliament considered it desirable that the commissioners should be able to control the number of carriages which plied for hire in a given area, and also to prescribe the kind and the description of the carriages. The section would, no doubt, give the local authority power to refuse to grant a licence if they thought that the construction of the cab, to use the common expression, was not satisfactory. They could take that matter into consideration, and also the number of cabs already licensed so that there should not be an undue number. On the other hand, if they found that there were not enough for the reasonable requirements of the public they would be able to license more from time to time as they thought fit.

He construes the section giving a power to refuse and select, but he is clearly referring to the words in this section “Such number of hackney coaches or carriages of any kind or description adapted to the carriage of persons as they think fit”. “As they think fit” confers a discretion which can apply both to the number of carriages and their description. No such words appear in either the Proclamation or the Metropolitan Act.

The Proclamation is not the first legislation on the matter. It repeals the Food Control Enactment 1939 of the F.M.S., which was the legislation in force before the Nipponese invasion. It was that which the Nipponese should have kept in force so far as military requirements allowed. From the form of the licence and from the re-issue of the Rice (Registration of Dealers) Order 1939, among others, it seems that it was the legislation in actual use, on the arrival of the British Military Administration, and on 16th September, 1945 when the Proclamation was made, although it is true that many additional Nipponese orders had since been made. The Proclamation expressly superseded the Enactment. The Enactment of 1939 says little of licensing though it makes detailed provisions on other matters. Among them it provides detailed powers to take possession of “premises” which include those used for storage and distribution of food,

to require work to be done on such premises and to regulate that work. This, with a power of forfeiture, seems the extent of the expropriating powers. It is not a short enactment. The full title reads "An Enactment to provide for the conservation, maintenance, and storage of an adequate supply of food in the Federated Malay States". It is not clear that the suppression of small traders must lead to the conservation, maintenance and storage of adequate food supplies or is essential to that purpose.

The only provision as to licensing which I can find is in section 9 (ii) (b) which reads:— "The Controller may direct that purchase or sale of any specified article shall be subject to licence". It makes no specific provision for the issue of licences. On this the Controller made the Rice (Registration of Dealers) Order 1939, before referred to, by which he appoints the Supply Officer, and Area Supply Officer each a Licencing Authority, and by which he purports to empower him "to refuse in his absolute discretion to issue any licence under this Order", section 8. This clearly goes far beyond any powers conferred on the Controller under the above quoted provision of the Enactment. So far as I am aware these provisions were never challenged and construed, possibly they were never abused, but if I had had to consider them I should have said they were obviously *ultra vires* of the Controller's powers under the Enactment. The provisions of this empower no suppression of lawful traders and in this do not go beyond the provisions I have been lately considering in the English legislation and in the Proclamation. Nor can I see in the Proclamation anything intended to amplify the executive powers, or to confer stronger powers of expropriation than those which existed at the time. On the other hand in the subordinate legislation under the Proclamation far narrower powers were granted or professed to be granted. So far as this comparison reveals any differences and such difference could be read as throwing light on the intention of the legislature, these are restrictive. In my opinion the Food Controller's powers properly construed are powers to licence and no more.

It is true that the Proclamation goes on in section 12 (2) to give to the Controller powers of revoking a licence, and that these powers are not dissimilar to the powers professed to be given by the Rules made under the Enactment. It seems to me that the provisions governing the issue are the determining considerations. These show, in the first place, how the legislation introduced is to affect the existing social and business conditions. Nor could the powers under

sub-section (2) be *bona fide* used by the grant of a specious licence for the sole purpose of cancelling it and thus of exercising such a power to refuse as the Rules purport to give but the other provisions do not. Licences may be cancelled by the Magistrate on conviction, they may also be cancelled by the Controller "without any reason assigned". These last words do not mean he can exercise an irresponsible discretion, nor do they necessarily imply that he need not, or should not, hear anything the licensee has to say. They mean, in my opinion, exactly what they say, having exercised his discretion properly and fairly he need assign no reason. Justices exercising a judicial discretion do not in all cases assign reasons and when they have been required to do so it is for the purposes of appeal, *Barker v. Barker*⁽¹³⁾, *Romilly v. Romilly*⁽¹⁴⁾. So in this country the Magistrate is required to give reasons on an appeal. There is no appeal provided from the decision of the Controller, an executive officer who might be acting quasi judicially. The words are of small moment and do not affect the general position nor the construction of the general words, though they may make more difficult the task of any one proceeding for a certiorari on the grounds of an improper exercise of the discretion.

The Respondent's arguments, that the endorsed Nipponese and the later licences are nullities, must in order to bind the applicants rely on the rule that persons are presumed to know the law and that the defects in their vendors' titles were legally apparent and should have been known to them. The law in this case is, in part, to be found in Gazette Notification 80 and is subject to "such orders and directions as they may from time to time receive from the Food Controller". Whatever these words mean I do not exactly know, but they seem to make, if valid, the Assistant Food Controller's legal powers quite unknowable or known only to the Controller and himself. The rule has always been qualified by the consideration that there are difficult and doubtful points of law. Moreover as Lord Atkin said in *Evans v. Bartlam*⁽¹⁵⁾ :—

For my part I am not prepared to accept the view that there is in law any presumption that any one, even a Judge, knows all the rules and orders of the Supreme Court. The fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.

I do not see its application here.

It will be observed that Farwell L.J. in the words cited above speaks of two duties imposed on the Secretary of State "The first is to grant licences". This he deduces from the final result of plying for

hire without a licence. Exactly the same applies here. If the Food Controller chose to limit the period for the issue of licences, he, at the same time, limited the duty but added to its urgency. The respondent's case is that in January 1946 some officer or officers in Teluk Anson disregarded their departmental duties. I think they disregarded their legal duties also. The question is what are the consequences.

The respondent's case is not simply that the applicant's predecessors did not take out a licence in January 1946, but that nothing then was done. The position as I understand it was that the Assistant Food Controller could require persons to take a licence and failure to do so involved penalties, but with that went a duty to issue, and, as it seems to me, a duty to set up the machinery contemplated for the purposes of the Proclamation. In fact the predecessors continued to trade on their old licences and were always treated as licensed retailers. They were apparently regarded as such by Food Control Officers and the public. The applicants have bought their businesses as they stood and, with the possible exception of Muthusamy, with the consent and, in one case at least, on the representations of the respondent. He has issued to each a licence valid on the face of it, which he has since purported to cancel on a succession of grounds.

This cancellation is attacked as illegal and, I think, it is. The applicants might rely on this, continue their businesses and plead this illegality as a defence to prosecution or other proceeding. If the applicants have any other remedy they cannot obtain that which they are pursuing. The licence is however but part of a system of control and distribution. The Assistant Food Controller has other functions and duties, and has control of supplies. To rely on defence would not vindicate all the applicants' rights. They seek to be treated as licensed retailers. The whole matter could probably be rectified by a licence from the Controller, whose powers are not, in my opinion, controlled by the time limit in the Rules 2 of Gazette Notification No. 82 of 1945, but the Controller is not before the Court.

As between private parties the arguments put forward by the respondent could almost certainly be met by an estoppel or by an action in a warranty implied by law. It is said that estoppel is not available against the Crown and this licence may be regarded as claimed against the Crown. This rule, however, does not seem to extend to estoppel *in pais* which alone could arise here. There are reasons why rules of private law should not be extended to cover and restrict public rights, or the public interest suffer for

the acts of an official. Such considerations do not seem to me to apply here. There is no question of countenancing or exonerating any crime or *malum in se*. The cases in which the Crown has been held bound by estoppel mostly relate to land. In such cases it may be the Crown's rights are rights of property not differing in substance from those of a private person. It is not however always easy to distinguish the public and private rights of Government, and in the case to which I shall refer, and in which the Court went beyond mere estoppel to imply the grant of a licence of another kind, the land was foreshore claimed by the Government for a road and the public interest was closely involved.

This case is *Attorney General of Southern Nigeria v. John Holt and Co.*⁽¹⁶⁾. The respondents owned land on the seashore at Lagos, under native grants, confirmed by Crown grants of 1861 the year in which the island was ceded. The land was described as bounded by the sea. It was subject to erosion and over a number of years works were carried out which in fact resulted in the reclamation of a strip along the seafront. This was claimed as Crown land as not being the result of natural accretion. The Chief Justice tried the case and found the grants did not include the foreshore. He was of opinion that Government knew of the reclamation user and building on the land and that the presumption was that it was done with the permission of the Government for the time being. This permission he thought was probably by licence to the riparian owners in consideration of their reclaiming land from the lagoon. He held the licence irrevocable and perpetual. On the Attorney General's appeal to the full Court of Nigeria, which consisted of the Chief Justice himself with two others, the Court varied the judgment by finding for the respondents an easement by prescription over one plot only out of five. That is to say they refused to imply a licence. The Chief Justice agreed on the ground that the Governor could only make grants under the seal of the Colony, and had no authority to make an indirect grant in any other manner.

This is a strong case, the Chief Justice was induced to change his opinion on this argument that the Governor had an authority limited by law and exercisable in the prescribed way only and, when no grant had been made in that way none other could be implied. Moreover the powers of the Governor in this regard are usually inserted in the constitutional instruments of the Colony themselves. This argument is to my mind indistinguishable from that which might be advanced in this case that a licence could only be

granted in accordance with the provisions and forms of the rules made, that none other could exist, and that, therefore, the existence of none other could be implied. The weight of such argument with the Chief Justice of Nigeria may be seen. The Privy Council, however, set aside the judgment of the Full Court and the judgment of the Chief Justice in the Court of first instance was restored. Lord Shaw of Dunfermline in delivering judgment said :—

Their Lordships find themselves in agreement with Osborne, C.J., who tried the cause, and has submitted both facts and law to a thorough consideration, that "it is quite impossible to believe that all the reclamation and subsequent building can have gone on without the knowledge and against the wish of the Government.....as the Government must have been aware of the reclamation and subsequent building, it is more probable that those acts were done with permission from the Governor for the time being than that they were acts of trespass done in defiance of the Government.

It remains accordingly for the Board to consider, under such circumstances, whether it is now the right of the Crown to subvert this long-continued occupation and to obtain an injunction which would extrude the respondents from the reclaimed land. One result of no inconsiderable consequence would, of course, follow. The plots of land, all of which were bounded by the foreshore and the sea, would be converted into inland properties, and the result of artificial reclamation upon the foreshore forty years ago, a reclamation made as above described, not objected to, and followed by occupation ever since, would be the loss of all kinds of navigation, groundage, and other foreshore rights, and the destruction of probably the most serious elements of value in the whole of the respondent's properties.

Their Lordships are of opinion that this result is not in accordance with law.

Further, so far as the Crown is concerned, it is recognised by law that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, a licence had been granted and duly recorded to the respondents to reclaim as was done, that licence would have been in entire accord not only with the right of the subject but with his duty of the Crown."

Most of these considerations on which the Privy Council then acted seem to me to apply here.

In this case there are far better grounds for saying that these businesses were carried on, acquired by the applicants, and conducted by them with permission of the Government and even with representations from its officers that they were licensed. While in that case there may have been a long continued permission or at least acquiescence, in this there was active assent. I, therefore, do not accept the respondent's contention that there was no original licence to support the issue of one in February 1947, if necessary in these circumstances one should be implied. I think applicants are entitled to have their licences treated as valid.

There is another matter I should refer to, the cases which I have cited show that the order made is not always that which might be expected or strictly applicable to the case. In point of fact if the substantive rights are vindicated no point seems to be made, as a rule, to the wording of the Order. In this case, however, the Crown Counsel has taken points which are purely verbal as to the terms of the Order. It might be well, therefore, to amend the rule asked for by adding some provision to the effect that the respondent shall not avoid or treat as avoided the licences granted. There does not seem to me any authority for or against making such amendment now.

Mr. Neal :— I cannot agree to any amendment. The matter came to me from the Attorney General. I am not in a position to agree myself.

Mr. Sharma :— I ask for a peremptory order under section 47 and I ask for costs under section 49. I ask for an order in the present form.

Mr. Neal asked to stay execution, the order to lie in the Registry. *Mr. Sharma* objected and said that his clients were still suffering loss. Peremptory Order should therefore issue and be stayed for the period of appeal and the applicants to have costs of the cause.

Order Accordingly.

SINGAPORE REPORTS.

LEE AH CHAI v. REX.

[Appellate Criminal Jurisdiction (Murray-Aynsley, C.J.)
August 30, 1947]

Penal Code, Section 304A — Degree of negligence required to be proved.

This was an appeal from a conviction under Section 304 A of the Penal Code.

Held, that the degree of negligence required to be proved in charges under section 304 A of the Penal Code is that laid down in cases of manslaughter by negligence in England.

Cases referred to :—

- (1) *Lai Cheow Keok v. P. P.* (1940) 9 M.L.J. 104.
- (2) *R. v. Bateman* 19 Cr. App. Cases 15.
- (3) *Andrews v. Director of Public Prosecutions* (1937) A.C. 576.

MAGISTRATE'S APPEAL.

K. E. W. Hatchard for the Appellant.

Lim Koon Teck (D.P.P.) for the Respondent.

Murray-Aynsley, C. J. :— This is an appeal from a conviction under section 304A of the Penal Code.